IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.330 of 2004

Date of decision: August 30, 2007

Kewal Ram **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : M/s Anup Chitkara & Anil Chauhan, Advocates.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge(Oral)

Heard and gone through the record.

2. Appellant alongwith one Satbir Singh had been sent up for trial for an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act for being in exclusive and conscious possession of 2 kgs. of *Charas.*

3. As per prosecution story when PW-5 SI Kaur Singh, accompanied by PW-1 Constable Sunder Singh, PW-6 Constable Mukesh Kumar and one Home Guard person named Tilak Ram, was present at a place called Parlidhar forest in connection with routine patrolling, the appellant and his accomplice Satbir Singh were seen coming from the opposite direction. On seeing the police they turned back and tried to run away. They were overpowered. They had covered themselves with blankets. Search of the person of the

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Whether reporters of the local papers may be allowed to see the judgment?

appellant was conducted. He was found carrying a plastic bag. That bag was opened and it was found to contain *Charas* kept in a polythene bag. On weighment, the *Charas* was found to be 2 kgs. Two samples, each weighing 25 grams, were separated. One of the samples was sent to the Chemical Examiner, who gave the opinion that the sample contained resin to the extent of 33.45 per cent.

4. Trial Court has convicted the appellant holding that the testimony of PW-5 SI Kaur Singh, PW-1 Constable Sunder Singh and PW-6 Constable Mukesh Kumar proves the prosecution version beyond reasonable doubt.

5. Learned counsel representing the appellant submits that the evidence on record suggests that the Police Officer heading the patrol party had prior information or knowledge that *Charas* was being carried but in spite of that he did not comply with the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act. He submits that even though PW-5 SI Kaur Singh and the above named two Constables accompanying him have testified that the appellant was apprised of his right of being searched in the presence of a Gazetted Officer or a Magistrate and he opted for the search on the spot by PW-5 SI Kaur Singh himself, yet no record of the compliance of the provision of Section 50 of the Narcotic Drugs and Psychotropic Substances Act had been prepared, which suggests that the oral evidence given by PW-5 SI Kaur Singh and the above named two Constables is an afterthought. His further submission is that the evidence of the three witnesses named above is self-contradictory indicating that the story of the prosecution may not be true.

6. We have considered both the submissions, in the light of the evidence on record. As regards the first submission, all the three witnesses have stated that the appellant had consented to the search of his person on the spot by PW-5 SI Kaur Singh. However, there is no record of the appellant having been apprised of his right of being searched in the presence of a Magistrate or a Gazetted Officer, either in the form of a separate memo or by way of mention in the search and seizure memo or the earliest version that was sent to the Police Station for the formal registration of the case or in the special report that was sent to the superior police officer, under Section 57 of the Narcotic Drugs and Psychotropic Substances Act. Now, the very fact that the witnesses have stated that the appellant had consented for his search on the spot and did not want to be searched in the presence of a Gazetted Officer or a Magistrate gives the impression that PW-5 SI Kaur Singh had either prior information or the knowledge that appellant was carrying *Charas* on his person. If it were not so, why should have he asked for the consent of the appellant, as testified by him and his two Constables, namely PW-1 Sunder Singh and PW-6 Mukesh Kumar. In fact, this story appears to be an after thought having been developed during the course of the trial on coming to know that the case might fail because of non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act. Even if it be assumed for the sake of argument that the appellant was given an option to be searched in the presence of a Gazetted Officer or a Magistrate and he consented to his being searched on the spot by PW-5 SI Kaur Singh himself that would not amount to substantial compliance with the provision of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, because none

of the three witnesses has testified that the appellant had been apprised that he had a statutory right to be searched in the presence of a Gazetted Officer or a Magistrate.

7. The Hon'ble Supreme Court in *Dilip and another versus State of M.P., (2007) 1 Supreme Court Cases 450*, where the facts were similar to the facts of the present case, has held that compliance of Section 50 of the Act was essential and its non-compliance made the search and the recovery doubtful.

8. As regards the second submission, we find that there are material contradictions in the testimony of the three witnesses. PW-5 SI Kaur Singh has stated that when the appellant was overpowered and thereafter search of his person was conducted he was found to be carrying a plastic bag and that bag contained another polythene bag. He does not say that *Charas* was recovered from that plastic bag or the polythene bag or from the personal search of the appellant. What does he say is only this much that the appellant was having a plastic bag and that bag contained a polythene bag. And then in the next sentence he says that *Charas* was recovered in the shape of sticks. He has nowhere stated that the *Charas* was recovered from either of the two bags. The other two witnesses, namely PW-1 Constable Sunder Singh and PW-6 Constable Mukesh Kumar, speak of only one bag, i.e., the polythene bag. Even though they say that *Charas* was recovered from this polythene bag, they do not say that this polythene bag was contained in another plastic bag. Not only this, they have very categorically stated that the appellant was holding only a polythene bag, meaning thereby that polythene bag itself was in the hand of the appellant and it (polythene bag) was not contained in any other

bag. This contradiction, in our considered view, is quite material and renders the prosecution version suspicious.

9. For the foregoing reasons, we allow the appeal, set aside the judgment of the trial Court convicting and sentencing the appellant, as aforesaid, and acquit him. He being in jail, serving out the sentence awarded by the trial Court, is ordered to be set at liberty forthwith, in case his detention is not required in any other case.

10. Appeal stands disposed of.

(Surjit Singh), J

August 30, 2007(sd) **(Surinder Singh), J**